

MOTION FILED

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No. 73

UNITED STATES OF AMERICA,

Appellant,

—v.—

STATE OF MISSISSIPPI; ROSS R. BARNETT, JOE T. PATTERSON,
HEBER A. LADNER, as members of the MISSISSIPPI STATE
BOARD OF ELECTION COMMISSIONERS; H. K. WHITTINGTON,
Circuit Clerk and Registrar of Amite County; MRS. PAU-
LINE EASLEY, Circuit Clerk and Registrar of Claiborne
County; J. W. SMITH, Circuit Clerk and Registrar of
Coahoma County; MRS. MARTHA TURNER LAMB, Circuit
Clerk and Registrar of Le Flore County; T. E. WIGGINS,
Circuit Clerk and Registrar of Lowndes County; WEN-
DELL R. HOLMES, Circuit Clerk and Registrar of Pike
County,

Appellees.

**MOTION FOR LEAVE TO FILE AND BRIEF OF
THE AMERICAN CIVIL LIBERTIES UNION,
AMICUS CURIAE**

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**MOTION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE**

The American Civil Liberties Union as *amicus curiae* respectfully moves this court for leave to file the attached brief. The United States has consented; the State of Mississippi has denied consent. The consent and denial are on file with the Clerk.

This case is of crucial importance to the freedom of the nearly one-half million eligible Negro citizens of Mississippi to exercise their right to vote. Denial of the franchise is one of the principal methods of maintaining Negroes in a second-class status in Mississippi. See generally, 1961 United States Commission on Civil Rights Report, Vol. I, Voting. As a direct consequence of their inability to vote, Negroes are unable to secure justice from the law enforcement officials or courts of Mississippi, or to vindicate their civil rights and liberties. The case is of enormous importance to the attainment of these goals.

This brief supports the claims set forth in the complaint of the United States in the District Court. These are that certain constitutional and statutory provisions of the State of Mississippi dealing with voter qualification and election procedures are invalid. Specifically, the United States alleges that Sections 244 and 241A of the Mississippi Constitution, so much of Section 3209.6, Mississippi Code, as permits the destruction of voting records, and Chapters 570, 571, 572 and 573 of the Mississippi Laws of 1962 are in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution and the Civil Rights Acts of 1957 and 1960.

In addition to supporting the claims of the United States, *Amicus* attacks the constitutionality of the Mississippi poll tax as applied to Mississippi State elections. The United States in its complaint does not assert that the Mississippi poll tax is invalid.

While *amicus curiae* ordinarily limits itself to discussing the law within the context of the case as framed by the pleadings, a court has discretionary power to accept aid

from *amici curiae* which goes beyond the ordinary function. See Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 Yale L. J. 694 (1963). In *Bush v. Orleans Parish School Board*, 191 F. Supp. 871 (E. D. La. 1961), *affd.* 367 U. S. 908 (1962), the court granted an injunction not on the motion of the plaintiffs, but of the United States as *amicus curiae*. Although the government in that case was "no ordinary amicus," 191 F. Supp. at 877, the principle involved applies here. The court in *Bush*, having taken jurisdiction of the case initiated by named litigants, exercised a form of "protective jurisdiction" and invited the government's participation to "aid the court in the effectuation of its judgment." *Id.* at 876. The present suit was initiated by the Attorney General as petitioner, and the requests for additional relief contained in the attached *amicus curiae* brief can be closely analogized to the government's request for injunctive relief in *Bush*.*

Viewed another way, the *amicus* is simply suggesting a course of action which the court might follow *sua sponte*. See *Bush v. Orleans Parish School Board*, *supra* at 878 n. 16. See *Mapp v. Ohio*, 367 U. S. 643 (1961) (argument that *Wolf v. Colorado* should be overruled contained only in brief of American Civil Liberties Union, *amicus curiae*). Moreover, in the present case the additional relief requested by *Amicus* falls within Prayer No. Eight of the complaint that the court "grant such additional relief as justice may require" (R. 23). Effective relief requires that

* The *amicus curiae* brief submitted by the American Veterans Committee in *Sweatt v. Painter*, 339 U. S. 629 (1950), also requested the Court to issue a stronger mandate than the petitioner sought. Cf. *Faubus v. United States*, 254 F. 2d 797 (8th Cir. 1958); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238 (1944).

all unconstitutional obstacles between a citizen and the polling booth be enjoined.

Respectfully submitted,

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**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION,
AMICUS CURIAE**

Interest of Amicus

The interest of *amicus* is set forth in the attached motion
for leave to file this brief.

Opinions Below

The opinions of the three judge district court are reported
at 229 F. Supp. 925 (S. D. Miss., 1964).

Constitutional Provisions Involved

MISSISSIPPI CONSTITUTION

Section 241:

Every inhabitant of this state, except idiots, insane persons and Indians not taxed, . . . who has paid on or before the first day of February of the year in which he shall offer to vote, all poll taxes which may have been legally required of him, and which he has had an opportunity of paying according to law, for the two preceding years, and who shall produce to the officer holding the election satisfactory evidence that he has paid such taxes, is declared to be a qualified elector; . . .

Section 241-A:

In addition to all other qualifications required of a person to be entitled to register for the purpose of becoming a qualified elector, such person shall be of good moral character.

The Legislature shall have the power to enforce the provisions of this section by appropriate legislation.

Section 243:

A uniform poll tax of two dollars, to be used in aid of common schools, and for no other purpose, is hereby imposed on every inhabitant of this state, male or female, between the ages of twenty-one and sixty years, except persons who are deaf and dumb, or blind, or who are maimed by loss of hand or foot; said tax to be a lien only on taxable property. The board of supervisors of any county may, for the purpose of aiding schools in that county, increase the poll tax in said

county but in no case shall the entire poll tax exceed in any one year three dollars on each poll. No criminal proceedings shall be allowed to enforce the collection of the poll tax.

Section 244:

Every elector shall . . . be able to read and write any section of the Constitution of this State and give a reasonable interpretation thereof to the county registrar. He shall demonstrate to the county registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government.

The person applying to register shall make a sworn, written application for registration on a form to be prescribed by the state board of election commissioners, exhibiting therein the essential facts and qualifications necessary to show that he is entitled to register and vote, said application to be entirely written, dated and signed by the applicant in the presence of the county registrar, without assistance or suggestion from any person or memorandum whatever; provided, however, that if the applicant is unable to write his application by reason of physical disability, the same, upon his oath of such disability, shall be written at his unassisted dictation by the county registrar.

Any new or additional qualifications herein imposed shall not be required of any person who was a duly registered and qualified elector of this state prior to January 1, 1954.

The Legislature shall have the power to enforce the provisions of this section by appropriate legislation.

Statement of the Case

This action was instituted by the United States on August 28, 1962, in the United States District Court for the Southern District of Mississippi under 42 U. S. C. 1971(d) and 28 U. S. C. 1345. The appellees are the State of Mississippi, the members of the State Board of Election Commissioners, and six county voter registrars. The complaint challenged the constitutionality of certain constitutional and statutory provisions of the State of Mississippi dealing with voter qualification and election procedures. Specifically, it claimed that Sections 244 and 241A of the Mississippi Constitution, so much of Section 3209.6 Mississippi Code, as permits the destruction of voting records, and Chapters 570, 571, 572 and 573 of the Mississippi Laws of 1962 are invalid as in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution and the Civil Rights Acts of 1957 and 1960. By way of relief, the United States requested that the challenged provisions be declared unconstitutional; that the court find that the implementation of the invalid legislation has deprived Negro citizens of the right to vote on account of their race, and that the deprivations have been pursuant to a pattern or practice of racial discrimination within the meaning of 42 U. S. C. 1971(e); and the court grant appropriate injunctive relief.

Because the complaint challenged, on constitutional grounds, certain provisions of the State constitution and statutes, a district court of three judges was convened pursuant to 28 U. S. C. 2281. On November 17 and 19, 1962, appellees filed motions requesting that the complaint be dismissed on the grounds that the complaint failed to state a claim upon which relief could be granted. On March 5, 1964, before trial, the district court, Circuit Judge Brown

dissenting, decided that the complaint failed to state a claim upon which relief could be granted and entered an order dismissing the complaint. On April 10, 1964, the United States filed a notice of appeal to this Court, and jurisdiction was noted on June 22, 1964.

ARGUMENT

Introduction

The constitutional invalidity of the Mississippi voting laws discussed in this brief is shown by their history and past and present effects. These laws intentionally discriminate on the grounds of race and implement Mississippi's long-standing legislative policy of disenfranchising Negroes. See Appendix, "Restrictions on Negro Voting in Mississippi History."¹ The state constitutional and statutory provisions attacked here might in other circumstances be defended as valid measures to protect the quality of the electorate. Any such defense by appellees is obviously a sham because of the studied effort made by Mississippi since the Nineteenth Century to enact laws which are innocuous on their face but invidious in operation. The following brief historical survey, largely taken from the exhaustive historical study contained in the Appendix, overcomes any presumption that Mississippi's voting laws were passed and are being administered in good faith.

During Reconstruction in Mississippi, Negro males were enfranchised for the first time and soon constituted a majority of the Mississippi electorate. By 1870, many Negroes

¹ The Appendix, which has been separately filed with the Clerk, was prepared by Mr. Kenneth Kemper, now a student at Columbia Law School. A letter from James W. Silver, Professor of History at The University of Mississippi, which confirms the accuracy of The Appendix, has also been filed with the Clerk.

had seats in the state legislature. White resentment led to attempts to again subjugate the Negro through the use of violence, intimidation, and economic sanctions—all designed to deprive him of the vote. By 1875 this goal had been achieved. The new white-controlled legislature then provided for the appointment of voting registrars with broad discretionary powers to be used in discouraging Negro voting.

Because some white Mississippians were displeased with the extra-legal tactics (often subject to corruption and use against whites) employed to keep the political structure white, a state constitutional convention was called to find permanent methods of maintaining white control. Although a majority of the registered voters were Negroes, an ugly campaign resulted in only one Negro delegate being elected to the convention.

From the outset there was complete candor that the purpose of the Convention of 1890 was to assure the ascendancy of that "race whose rule has always meant prosperity and happiness to all races." Opening address of the President of the Convention, S. S. Calhoun. The Mississippi Supreme Court later acknowledged that the intent of the Convention was "to obstruct the exercise of the franchise by the Negro race." *Ratliff v. Beale*, 74 Miss. 247, 266, 20 So. 865, 868 (1896). The court added that "Restrained by the Federal Constitution from discriminating against the Negro race, the convention discriminated against its characteristics . . ." 20 So. at 868.

Several means were employed to effect this purpose. Timely payment of a poll tax was made a prerequisite to voting. The poll tax "was primarily intended by the framers . . . as a clog upon the franchise . . ." *Id.* at 869; Appendix at 36-38. A voting applicant was henceforth required to read a section of the state constitution or to give

a reasonable interpretation of a section read to him. The literacy requirement was chosen to take advantage of the sharp disparity between the number of illiterate Negroes (76%) and illiterate whites (11%). Moreover, the interpretation alternative, with registrars having discretion to judge answers, in effect exempted white illiterates from the literacy requirement. Indeed, as the American Law Review wrote at the time, the discriminatory implementation of the plan by white registrars was expected as a matter of course. The Convention also adopted an apportionment system, retained to the present day, which insured that the counties whose populations are predominantly white control the legislature and election of the executive through an electoral college.

Upon the adoption of the Constitution, the President of the Convention congratulated its members and noted: "[The white] race alone can now safely exercise the function of ruling. . . ." Speech by President Calhoun. The confidence of the speaker was justified; prior to the Convention Negroes constituted a majority of the registered voters in Mississippi, but by 1892 only 8,615 Negroes were included among the 78,742 registered voters.

In 1902, whites, fearing that the Negro would overcome the literacy barrier by taking advantage of the public education system, adopted a white primary. When this device was declared unconstitutional in *Smith v. Allwright*, 321 U. S. 649 (1944), Mississippi responded by establishing as a qualification for primaries a vague and indefinite test (that voters be "in accord with the party's principles") and provided for its discretionary administration by white primary officers.

In 1954, partly due to specters raised by *Brown v. Board of Education*, 349 U. S. 294 (1954), the state constitution was amended to require a voting registrant (1) to read

and write any section of the state constitution, *and* (2) to give a reasonable interpretation thereof, *and* (3) to demonstrate an understanding of "the duties and obligations of citizenship," *and*, finally, (4) to present a registration form prepared and sworn to by him. Miss. Const. Section 244. These new tests were to be applied only to people registering after passage of the amendment. The brunt of this obnoxious "grandfather clause" fell, of course, on those not already registered, a group containing a vastly higher percentage of prospective Negro voters than prospective white voters. Moreover, the requirements imposed were more burdensome generally to unregistered Negroes than to unregistered whites—even apart from the hostile registrars—because Mississippi provided Negroes with inferior educational opportunities.

The discretion of registrars was recently augmented by a statute providing that voters be of "good moral character." Miss. Code, Section 3235. This provision has been reinforced by requiring the names and addresses of new applicants for voter registration to be published in local newspapers so that any person having knowledge of their lack of "good moral character" may contest the registration. Miss. Code, Sections 3212.7, 3217.01-3217.15. Publication itself is an additional burden. Much worse, however, it is an open invitation to those who employ fear and force to intimidate prospective Negro registrants.

I.

Mississippi's requirement that voting registrants read and write and interpret the State Constitution denies Negro citizens the equal protection of the laws, due process of law, and the right to vote guaranteed by the Fourteenth and Fifteenth Amendments.

Section 244 of the Mississippi Constitution provides:

Every elector shall . . . be able to read and write any section of the Constitution of this State and give a reasonable interpretation thereof to the county registrar. He shall demonstrate to the county registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government.

The person applying to register shall make a sworn, written application for registration on a form to be prescribed by the state board of election commissioners, exhibiting therein the essential facts and qualifications necessary to show that he is entitled to register and vote, said application to be entirely written, dated and signed by the applicant in the presence of the county registrar, without assistance or suggestion from any person or memorandum whatever; provided, however, that if the applicant is unable to write his application by reason of physical disability, the same, upon his oath of such disability, shall be written at his unassisted dictation by the county registrar.

Any new or additional qualifications herein imposed shall not be required of any person who was a duly registered and qualified elector of this state prior to January 1, 1954.

The Legislature shall have the power to enforce the provisions of this section by appropriate legislation.

The Legislature responded to the invitation contained in the final paragraph. Mississippi Code, Section 3235.

The Mississippi literacy test appears egalitarian on its face, but analysis reveals that its effect is inevitably discriminatory because of the social and legislative setting in Mississippi. Accordingly, the test violates the Equal Protection and Due Process clauses of the Fourteenth Amendment and the Fifteenth Amendment. Furthermore, the literacy test and interpretation provisions, in leaving uncontrolled discretion to state officials, violate the Fourteenth and Fifteenth Amendments by permitting and, indeed, inviting racial discrimination in the application of the tests. That such discrimination has actually taken place on a wide scale is a matter of public knowledge and is demonstrated by the evidence in the record (R. 388-1275, 1286-1408).

The leading case of *Williams v. Mississippi*, 170 U. S. 213 (1898), is not in any respect inconsistent with these contentions. *Williams* decided that a Negro convicted of murder by an all-white jury was not denied equal protection of the laws. The petitioner contended that (1) the literacy test, in conjunction with certain oath requirements, was susceptible of manipulation by registrars to prevent Negroes from registering, and (2) since the jury panel was drawn from voter registration lists, Negroes were disqualified from jury duty. In other words, the vice of the literacy test was claimed to lie in its administration. The Court, relying on a prior decision of the Supreme Court of Mississippi which found that jurors were selected without reference to voting lists, ruled that petitioner had not proven discrimination in the administration of the literacy test.

The present case is distinguishable from *Williams* for at least six reasons:

(1) *Williams* decided only a question of jury selection; it does not govern the constitutionality of a literacy test as applied to voter registration.

(2) The instant case, unlike *Williams*, involves allegations that the literacy test is invalid on its face.

(3) The Department of Justice introduced extensive evidence in the instant case proving beyond question that the literacy test is discriminatory as applied.

(4) The relevant constitutional language is different:

(a) The 1898 version of Section 244 considered in *Williams*, did not require that an applicant be able to write, and was drafted in the disjunctive:

"[E]very elector shall . . . be able to read any section of the constitution of this state; *or* he shall be able to understand the same when read to him, *or* give a reasonable interpretation thereof." (Emphasis added.)

Thus the interpretation test was an alternative to the reading test, and it was a reasonable inference that interpretation would be satisfactory if it showed a level of intelligence and education comparable to that of any person who could read.

(b) The present Section 244 is drafted in the conjunctive and there is an added writing requirement. It provides no standards for determining what constitutes a sufficient interpretation. Moreover, the combination of reading, writing and interpretation tests plainly imposes a more rigid standard than that considered in *Williams*. This more rigid standard, aside from its legislative and social setting, imposes requirements that do not meet any valid state purpose.

(5) The present interpretation test, containing no standards, is void for vagueness and for its inherent non-uniformity of application due to the wide discretion vested in the administering officials.

(6) *Williams* rests on the discredited proposition that unless a statute says *in haec verba* that Negroes cannot vote it is not void on its face. Since 1898, when that case was decided, the Supreme Court has departed from that position. See e.g., *Nixon v. Herndon*, 273 U. S. 299 (1927); *United States v. Classic*, 313 U. S. 299 (1941); and *Smith v. Allwright*, 321 U. S. 649 (1944). In *Davis v. Schnell*, 81 F. Supp. 872, *aff'd per curiam* 336 U. S. 933 (1949), it was held that merely because discrimination is subtle does not mean it is valid, and that the Fifteenth Amendment nullifies sophisticated as well as simple-minded modes of discrimination. The *Davis* court went behind the innocent words to find both a guilty intent and an impermissible purpose.

"We cannot ignore the impact of the Boswell Amendment upon Negro citizens because it avoids mention of race or color: 'To do this would be to shut our eyes to what all others than we can see and understand.'" 81 F. Supp. at 881.

The Mississippi literacy and interpretation tests are extremely sophisticated methods of discrimination which rest on the social history of the state as well as on the arbitrariness of individual registrars. *Williams* can no longer be considered authority for the proposition that the United States Constitution is not violated by allowing the Mississippi literacy test to continue to disenfranchise most of the eligible Negro voters of that state.

The present Section 244 was held constitutional by a three-judge federal district court in *Darby v. Daniel*, 168

F. Supp. 170 (1958). *Darby*, however, is not dispositive of the present case because (1) in *Darby* the plaintiffs conceded the constitutionality of the original Section 244 (168 F. Supp. at 181); (2) in the present case appellant challenges the validity of that section and presents substantial evidence and arguments not presented in *Darby* to support its contention; (3) *Darby* was decided by a lower court; (4) *Darby* was based, with respect to vagueness, on the fact that the words used in the present Section 244 ("read," "reasonable," "interpret," "understand") were also used in the original Section 244 conceded to be valid in *Darby*, 168 F. Supp. at 182, and (5) *Darby*, in regard to discrimination by the registrar, was based upon the plaintiffs' failure to prove such discrimination. Consequently no precedent impedes an analysis of the unconstitutionality of the Mississippi literacy test now before the Court.

A. The Mississippi Literacy and Constitutional Interpretation Tests Are Unconstitutional on Their Face Because of the Legislative and Social Setting in Which They Were Enacted and Operate.

The literacy and constitutional interpretation tests in Section 244 of the Mississippi Constitution do in fact, and were intended to, impede Negro voter registration, not only by inviting discrimination by the registrars who grade the essays on the meaning of the constitution, but also because Negroes, as a result of deliberate state policy, receive substantially poorer education than whites. As the Greenville, Mississippi, *Delta Democrat Times* said editorially on October 10, 1954:

✓ The proposal [Section 244] was designed to slow down Negro registrations and a number of [legislative] committee members have said they felt any long-range success in keeping Whites and Negroes separated lies in keeping Whites in control of the ballot boxes.

These tests are intimately related to an educational system which is designed to deprive Negroes of an opportunity to become literate. The Joint Committee of the National Education Association and the American Teachers Association, in a study entitled *Progress of the Education of Negroes, 1870-1950*, pointed out: (1) 45.3% of the population of Mississippi is Negro; (2) on a national average 11% of Negroes are illiterate as contrasted with 2.7% of whites; (3) in the period studied, Mississippi provided only \$32.55 per Negro pupil in daily school attendance while providing each such white pupil \$122.93; (4) the length of the school term was 141 days for Negroes and 163 days for whites; and (5) Negroes were able to attend school on an average per pupil of only 120 days per term while the whites attended 152 days. The 1961 report of the Mississippi State Department of Education, Division of Finance and Administration, shows that Negro pupils receive on a state-wide basis less than one-fourth as much support from local school funds as do white pupils. Such local funds constitute over one-half of the public school support. State-level funds are also discriminatorily allocated in favor of whites. Almost all white schools are accredited; almost all Negro schools are not.

In sum, there is the vicious cycle of (1) relatively high educational requirements for voting (and for holding public office, Miss. Const., Section 250) and consequently almost no Negro voting, which allows the election of (2) an all-white legislature that purposely keeps Negroes uneducated, which therefore means that (3) Negroes cannot qualify to vote, and the cycle begins again.

Literacy tests are not inherently unconstitutional, but as Mr. Justice Douglas pointed out in *Lassiter v. Northampton Election Board*, 360 U. S. 45, 53 (1959), a "literacy test may be unconstitutional on its face" if the legislative

setting of that test revealed that it is a "device to make racial discrimination easy." The present case involves just such a "device." The 1954 amendment to Section 244 of the Mississippi constitution was conceived of as a means for perpetuating white supremacy. See Appendix, p. 59, *et seq.*

The legislative and social settings in Mississippi show that the literacy test is not designed to insure an intelligent and independent exercise of the right to vote such as was approved by the Supreme Court in the *Lassiter* case. That decision held that literacy tests are not *per se* unconstitutional, but specifically left open the validity of literacy tests shown to be discriminatory in intent or effect. That such a test is unconstitutional finds support in the cases invalidating the white primary. *Nixon v. Herndon*, 273 U. S. 299 (1927); *United States v. Classic*, 313 U. S. 299 (1941); *Smith v. Allwright*, 321 U. S. 649 (1944).

A state which provides such unequal educational facilities for the Negro and white races may not deny the underprivileged race the opportunity to learn to read and write and to interpret its constitution, and then use this deprivation to disenfranchise that race. In such a setting, both a literacy test and a constitutional interpretation test are unconstitutional on their face.

B. The Mississippi Literacy and Constitutional Interpretation Tests Are Unconstitutional Because They Embody a Species of the Discriminatory Grandfather Clause.

The Mississippi literacy test, which is now mandatory rather than an alternative to the constitutional interpretation test, embodies a forbidden "grandfather clause": those persons already registered are exempted from the more stringent requirements by the device of permanent registration.

In speaking of the Oklahoma Constitution in *Guinn v. United States*, 238 U. S. 347, 364 (1915), the Supreme Court stated:

It is true it contains no express words of an exclusion from the standard [for registration] which it establishes . . . on account of race . . . prohibited by the Fifteenth Amendment, but the standard itself inherently brings that result into existence . . .

There the standard was a literacy test, but lineal descendants of those entitled to vote prior to enactment of the Fifteenth Amendment were expressly exempted. Thus a vast number of white citizens escaped the literacy burden and retained their franchise in spite of it, while Negro citizens felt its full burden. In Mississippi prior to the 1954 amendment to Section 244 of the Mississippi Constitution there was no mandatory literacy test. The 1898 version of Section 244 was drafted in the disjunctive, requiring registrants to be able to read *or* to understand the constitution when read to them. Under the biased eye of registrars, whites were registered and Negroes were not, as planned. In 1954 the section was rewritten in the conjunctive, making literacy an affirmative requirement. Given the disparity between white and Negro education, the literacy test becomes *per se* discriminatory.

But even if educational opportunity were equal, and even if the test were fairly administered so that whites and Negroes failed in equal proportions, the result would still be discriminatory. Inasmuch as those whites presently registered will remain registered, the absolute number of white voters must remain far greater than that of Negro voters far into the future, despite the fact that the white population exceeds the Negro by only a small percentage. Thus the necessary effect of the new standard, as in *Guinn*, is to

discriminate on grounds of race, an effect prohibited by the Fifteenth Amendment and the equal protection clause of the Fourteenth Amendment. The literacy test, a subtle "grandfather clause," is therefore unconstitutional on its face.

C. The Mississippi Constitutional Interpretation Test Imposes a Vague, Non-Uniform Standard and Is Not Reasonably Related to a Proper State Purpose.

The requirement of Section 244 that a voter registrant interpret a section of the state constitution is void for vagueness. The state constitutional provision and its implementing statutes do not define "a reasonable interpretation." Is it to mean what the Mississippi Supreme Court has said, what the words of the constitution would seem on their face to mean, any reasonable interpretation showing intelligent comprehension of the meaning of written language, or something else? In fact, the individual registrar has unlimited discretion to determine whether an interpretation is sufficient. The test thus is void not only for vagueness, but also because it provides no uniform standard by which all voters are to be judged equally. Different registrars will have different views as to the meaning of the constitutional provisions, the provisions put to registrants, and the type of interpretation which will be satisfactory. Moreover, such vague and non-uniform standard facilitates racial discrimination.

The Court's recent ruling in *Baggett v. Bullitt*, 377 U. S. 360 (1964), reaffirmed the established rule that "a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law." In *Baggett*, the Court invalidated loyalty oaths for state employees because their vagueness created "the hazard of

being prosecuted for knowing but guiltless behavior." Certainly the solicitude for individual conscience and rights, evidenced so forcefully by that opinion, encompasses protection of Mississippi's citizens against loss of their precious voting right through application of a standard even vaguer than those contained in the invalid loyalty oaths. *Baggett* and the authorities cited therein lend conclusive support to the contention that the interpretation test for voting violates due process of law.

Obviously, opinions can and do differ, even among trained lawyers and political scientists, as to the meaning of a state constitutional provision. Where a state's highest court has interpreted a provision, even a lawyer might well be unaware of it unless he had researched the particular point. Clearly it is unreasonable to assume that a citizen is unfit to vote unless he has studied all state court opinions construing provisions of the state constitution.

This conclusion is reinforced by the fact that no valid state purpose is served, reasonably or otherwise, by the requirement that a voter registrant be able to interpret the state constitution. It is not the duty of voters to be able to determine the validity of legislation; their intelligence is not revealed by answers to questions involving technical points of law. Indeed, most members of the state bar, and most elected officials of the state, would probably be unable to explain exactly which interpretation of the state constitution is "best" without research.

The improper purpose of an interpretation test is to disenfranchise Negroes. The evidence contained in the Appendix and in the record demonstrates that such discrimination occurs often in the application of the test. See *e.g.*, Appendix, at 61-67.

II.

The Mississippi voter registration provision requiring an applicant to possess "good moral character" is unconstitutionally vague on its face and has been applied in violation of the Fourteenth and Fifteenth Amendments.

Section 241-A of the Mississippi Constitution provides:

In addition to all other qualifications required of a person to be entitled to register for the purpose of becoming a qualified elector, such person shall be of good moral character.

The Legislature shall have the power to enforce the provisions of this section by appropriate legislation.

Section 3235 of the Mississippi Code provides, in pertinent part:

... any person registering after the effective date of this act shall be of good moral character as required by § 241-A of the Mississippi Constitution.

A. The "Good Moral Character" Requirement Is Unconstitutionally Vague on Its Face.

Although limitations on the right to vote have been sustained, *Lassiter v. Northampton County Board of Elections*, 360 U. S. 45 (1958), the power given to a state by U. S. Const., Article 1, Sec. 2, to prescribe such limitations is circumscribed by the Fourteenth and Fifteenth Amendments and by Article I, Sec. 4 as well. *United States v. Classic*, 313 U. S. 299 (1941); *Smith v. Allwright* 321 U. S. 649 (1944).

The Mississippi legislature has made the judgment that only citizens of "good moral character" are suited to vote. The present case does not require the court to decide the reasonableness of that legislative determination because the "good moral character" requirement must fall since it contains no standards to guide the registrars who are to apply it, and is therefore unconstitutionally vague.

The legislature may not delegate authority to the registrars without enunciating some guidelines for the exercise of that authority. The United States Supreme Court has recognized this principle and has consistently applied it to legislative delegations of authority. *E.g.*, in *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935), the Court invalidated an act of Congress because it contained no ascertainable standard. True, the Supreme Court has upheld delegation of authority in which no standards were ascertainable [*e.g.*, *McKinley v. United States*, 249 U. S. 397 (1919); *Intermountain Rate Cases*, 234 U. S. 476 (1914); *Fahy v. Mallonee*, 332 U. S. 245 (1947)], but these cases involved delegation to administrators in areas where long-standing customs had been established or the terms of the statute involved words susceptible of reasonably uniform interpretation. For example, the statute in *McKinley* authorized the Secretary of War to suppress "houses of ill fame" within reasonable distances of military camps. The term "houses of ill fame" obviously referred to houses of prostitution, and any interpretation of the words would raise only the factual issue of whether prostitution was being practiced in the given case. In this case, however, there is considerable controversy over what constitutes "good moral character."

In *Repouille v. United States*, 165 F. 2d 152 (2d Cir. 1947), naturalization was sought by an immigrant who had been convicted of manslaughter for killing his crippled

son, who was, in the words of Judge Learned Hand, "a physical monstrosity." Judge Hand, although not prepared to hold that the applicant was of good moral character, was clearly unwilling to hold that he was not:

"Many people—probably most people—do not make it a final ethical test of conduct that it shall not violate [the] law; few of us exact of ourselves or of others the unflinching obedience of a Socrates. There being no lawful means of accomplishing an end, which we believe righteous in itself, there have always been conscientious persons who feel no scruple in acting in defiance of a law which is repugnant to their personal convictions, and who even regard as martyrs those who suffered by doing so . . ." 165 F. 2d at 153.

Quite obviously there are few clear requisites of "good moral character" in the legal sense. The legal standard of "good moral character" should be less restrictive than the standard which might be favored, for example, by a religious body. In *Posuta v. United States*, 285 F. 2d 533 (2d Cir. 1961), it was held, per L. Hand, J., that a woman did not lack good moral character despite her admission of sexual relations with a man not her husband. The court expressed grave difficulty in defining "good moral character", finding reason to doubt whether the petitioner's conduct would be condemned by the ordinary man or woman. Thus, Judge Hand applied the rule he had enunciated earlier in *Repouille*: The standard should be

"Not these standards which we might ourselves approve, but whether 'the moral feelings, now prevalent generally in this country' would 'be outraged' by the conduct in question: that is, whether it conformed to 'the generally accepted moral convention current at the time.'" 165 F. 2d at 153.

If the Mississippi legislature had performed its duty of indicating what in its judgment constituted "good moral character," Negro registrants would have been apprised of the requirements they were obliged to meet. If they had failed to meet the explicit standards, they could have sought court review of the constitutionality of the standards as applied to them.

The difficulty of achieving a universally acceptable definition, rather than being an excuse for the abdication of legislative responsibility, indicates that the term chosen by the legislature was improper. A more precise term should have been used, if possible; if not, a series of standards should have been stated by the legislature. In the complete absence of guidelines, registrars are free to impose their individual moral views upon applicants. Indeed, in Mississippi, registrars may view Negro applicants as lacking in character by the very fact of their desire to vote, despite the constitutional mandates of the Fourteenth and Fifteenth Amendments.

B. The "Good Moral Character" Provision Has Been Unconstitutionally Applied as a Means of Evading the Guarantees of the Equal Protection of the Laws and the Right to Vote.

The good moral character requirement, contained in an amendment to the Mississippi Constitution, approved by the voters in 1960, was viewed as a means of maintaining segregation and perpetuating Negro disenfranchisement. The *Jackson Clarion-Ledger* said of the amendment and a companion proposal: "apparently both are aimed at maintaining segregation." See Appendix, p. 67, n.270.

The *Delta Democrat-Times* reported that:

"A proposed Mississippi voter registration requirement that a person be of 'good moral character' has

been labeled as 'clearly unconstitutional' by the Civil Rights Commission (Rev. Cox).

The Circuit Clerk, who registers voters, would be the judge of character. Rev. M. Cox of Gulfport, Chairman of the State Advisory Committee to the Commission, said at the Group's monthly meeting • Wednesday that he had received a letter from the Civil Rights Commission, saying that the Legislature's adoption of a morality voter requirement 'has really raised some eyebrows among the Civil Rights Staff.'

Retired Admiral R. Briscoe of Liberty, a Committee member, said the proposal doesn't define what the limits of morality are.' He said the requirement would give registrars 'an alibi' in excluding Negro voters." Appendix, p. 65.

The Citizens' Council newspaper urged voters "to safeguard Mississippi from the black bloc vote" by approving the proposed amendment which would require registrants to be of good moral character. The editorial said the proposed amendment would help "protect Mississippi ballot boxes from the self-seeking forays of bloc voting pressure groups" and discourage mass registration efforts on the part of irresponsible and immoral elements. Appendix, p. 67. John Emerich of the *McComb Enterprise-Journal* attacked the amendment because it was, in his opinion, "an ill disguised attempt to keep qualified Mississippi Negroes from voting." Appendix, p. 67. The *Clarion Ledger* supported the amendment because it was designed to safeguard segregation. See Appendix, p. 67.

Two implementing bills added a new dimension to the "good moral character" requirement by effectively facilitating the intimidation of would-be Negro voters. Miss. Code, Sections 3212.7, 3217.01-3217.15. The statutes pro-

vide that within ten days after receiving an application for registration, the registrar shall publish the applicant's name and address in a local newspaper once a week for two weeks. Within two weeks after the last publication, any other registered voter in the county may file an affidavit challenging the good moral character of the applicant. When such a challenge is filed, the registrar sets a date for a hearing, holds the hearing, considers the evidence, and makes a finding as to the applicant's character. In effect, the burden of proving good moral character is on the applicant. Most Negroes, knowing that their names will be published, are deterred from registering. If they attempt to register, these laws increase the possibility of economic, psychological or physical coercion. The history of the "good moral character" provision and of the legislation implementing it shows that the purpose of the new laws is perpetuation of racial discrimination in regard to voting. The court should invalidate Mississippi's "good moral character" provision, and the legislation implementing it on the grounds that they contravene the Fourteenth and Fifteenth Amendments of the United States Constitution.

III.

The Mississippi poll tax violates the Fourteenth Amendment's equal protection and due process clauses and the Fifteenth Amendment since the tax, in intent and application, discriminates against Negroes and imposes a privilege tax upon voting.

Section 241 of the Mississippi Constitution provides in pertinent part:

Every inhabitant of this state, except idiots, insane persons and Indians not taxed, . . . who has paid on or before the first day of February of the year in which he shall offer to vote, all poll taxes which may have been legally required of him, and which he has had an opportunity of paying according to law, for the two preceding years, and who shall produce to the officer holding the election satisfactory evidence that he has paid such taxes, is declared to be a qualified elector; . . .

Section 243 of the Mississippi Constitution provides:

A uniform poll tax of two dollars, to be used in aid of common schools, and for no other purpose, is hereby imposed on every inhabitant of this state, male or female, between the ages of twenty-one and sixty years, except persons who are deaf and dumb, or blind, or who are maimed by loss of hand or foot; said tax to be a lien only on taxable property. The board of supervisors of any county may, for the purpose of aiding schools in that county, increase the poll tax in said county but in no case shall the entire poll tax exceed in any one year three dollars on each poll. No criminal proceedings shall be allowed to enforce the collection of the poll tax.

The passage of the Twenty-Fourth Amendment to the United States Constitution makes it unnecessary to consider the constitutionality of Mississippi's poll tax as applied to federal elections. However, the recent amendment does not deal with the constitutionality of a poll tax for voting in state elections. Certainly, failure to outlaw such a requirement is not to legalize it. Therefore, the constitutionality of Mississippi's poll tax, as applied to state elections, is still undecided.

A. The Mississippi Constitutional Convention of 1890 Intended the Poll Tax as a Means to Limit Negro Suffrage, Not as a Revenue Measure.

The Constitution of 1890 was promulgated as a result of the conditions then existing in Mississippi. See Appendix, p. 23 *et seq.* The 1890 Convention was called to perpetuate white dominance over the Negro and eliminate the need for lawless action by those in positions of responsibility. These aims were clearly indicated by statements made at the Convention and in contemporary newspapers. The poll tax it adopted has stood for nearly seventy-five years. J. P. Coleman, *The Origin of the Constitution of 1890*, reprinted from the JOURNAL OF MISSISSIPPI HISTORY, April 1957; *Ratliff v. Beale*, 74 Miss. 247, 20 So. 865 (1896).

The Supreme Court of Mississippi, in *Ratliff*, construed Section 243 of the Constitution of 1890. At issue was a lien on property to compel payment of the poll tax. The court found it necessary to examine carefully the history of Section 243. This section, on its face, appears compulsory, but does not allow criminal proceedings for its enforcement. Moreover, liens are permitted only on taxable property, rendering Negroes, in 1890 and at present, less subject than whites to collection of the tax because Negroes generally do not have such property. In 1959, only 13.7% of white

farmers were tenants or sharecroppers, while 58.7% of the Negro farm operators did not own the land they worked. *United States Census of Agriculture: 1959, Vol. 1, part 33, p. 6.*

The Mississippi Supreme Court said:

"In our opinion, the clause [§243] was primarily intended by the framers of the constitution as a clog upon the franchise and, secondarily and incidentally only, as a means of revenue." 74 Miss. at 263, 20 So. at 869.

The court made it plain that the poll tax provision was not an isolated instance of discrimination through voting qualifications:

"Within the field of permissible action under the limitations imposed by the federal constitution, the convention swept the circle of expedients to obstruct the exercise of the franchise by the Negro race. By reason of its previous condition of servitude and dependence, this race had acquired or accentuated certain peculiarities of habit, of temperament and of character, which clearly distinguishes it, as a race, from that of the whites—a patient, docile people, but careless, landless and migratory within narrow limits, without forethought and its criminal members given rather to furtive offenses than to the robust crimes of the whites. Restrained by the federal constitution from discriminating against the Negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone." 74 Miss. at 266, 20 So. at 868.

The court's conclusions were supported on this further ground:

"It is to be noted that the section is a part of the article on franchise, and not of that on common schools, in aid of which the tax was levied, and where it would more appropriately be placed as a revenue measure. This is not of great importance, but is of some weight." 74 Miss. at 267, 20 So. at 868.

The Supreme Court of Mississippi narrowed the possible scope of the lien, by finding the tax voluntary and not subject to rigorous enforcement.

B. The Mississippi Legislative Intention With Regard to the Poll Tax Has Not Changed Since 1890.

If the poll tax is a revenue measure, it seems strange that the amount of the tax has not been raised by the legislature, although the period since 1890 has been inflationary. Also, the counties of Mississippi have generally failed to exercise their power to raise the tax from two dollars to the original statutory maximum of three dollars. It is therefore unlikely that the tax is intended as a means of raising revenue for the schools, whose needs have obviously increased since 1890. In the last presidential election year the total raised by the poll tax was probably less than one million dollars. The total tax revenue of Mississippi's state and local governments in 1961 was approximately 300 million dollars, plus revenues from state stores, other sources of income, and aid from the Federal Government, sources which are not inconsiderable. *Governmental Finances in 1961*, Department of Commerce, G-CF61-No. 2, October 26, 1962, p. 29; *County and City Data Book 1962*, Department of Commerce, 1962, p. 6. The revenue of less than one million dollars from the poll tax is insignificant when compared with the total revenue of the state, county, and local governments. It cannot be maintained that a tax which has remained static for so long and has become so

insignificant in the total economic picture is primarily a revenue measure.

Moreover, payment of the poll tax is voluntary rather than compulsory unless the taxed individual seeks to vote, as was clearly shown by the complainants in *United States v. Dogan*, 206 F. Supp. 446 (N. D. Miss. 1962). They were unable to prove that election officials refused their proffered payment, but did demonstrate that no positive effort was made to collect the tax. The judge's opinion indicates that the sheriff did not regard it as his duty to actively collect the tax. In fact, he does not seem to have been very anxious to collect it even though the complainants were statutorily required to pay the tax and indicated their desire to do so to a deputy sheriff. *Id.* at 449.

The Supreme Court of Mississippi has not changed its interpretation of the legislative intention behind the poll tax. In *Wylie v. Cade*, 174 Miss. 426, 432-33, 164 So. 579 (1935), that court adopted and approved its statement in *Ratliff* about that purpose. The conclusion is thus inescapable that the Mississippi poll tax is a privilege tax on voting and is intended to prevent Negroes from voting.

C. The Economic Situation in Mississippi Inevitably Results in Discrimination Against Negroes Through the Voluntary Poll Tax.

The poll tax puts an onerous burden on persons earning small amounts of money, if they wish to vote. A man earning less than \$1,000 a year cannot be expected to pay two dollars in February to preserve a right which cannot be exercised until November, especially if he is uncertain about being allowed to vote even if he pays the tax. To vote in a primary he must pay almost two years in advance. Mississippi Code, Section 3160 (1942).

The economic burden imposed by the Mississippi tax affects Negroes more than it does whites. The 1960 census

showed the disparity between the earnings of Negroes and whites in the state. Of Mississippians fourteen years of age or older, about seventy per cent of each race have some income. Of these, 33% of the whites and 69% of the Negroes earn less than \$1,000 per year, and 50% of the whites and 87% of the Negroes earn less than \$2,000 per year. The disparity is even greater when the earnings per family are compared:

Family Income	Percentage of Families	
	White	Negro
Under \$1,000	10.1%	37.1%
\$1,000-1,999	11.9%	29.1%
\$2,000-2,999	12.4%	16.7%
\$3,000-3,999	13.0%	8.0%
\$4,000-4,999	12.2%	4.2%
\$5,000-5,999	11.1%	2.0%
Above \$6,000	29.3%	2.9%

The economic burden of the poll tax and the disparity between the economic situation of Negroes and whites is particularly striking in regard to Negro farmers. These include many of the Negroes who do have steady work, *United States Census of Population, 1960, Mississippi*, PC(1)-26C, pp. 113, 135, and their small incomes show they are unable to part easily with two dollars to obtain a privilege which may be denied anyway. There are 83,171 white farmers and 54,972 Negro farmers in Mississippi. The average value of the land and buildings of each white farmer is \$18,341. The corresponding average figure for Negro farmers is \$4,382. The average value per farm of products sold is \$5,602 for white farmers and \$1,792 for Negro farmers. Therefore, many more Negroes than whites are inevitably disenfranchised by the poll tax, because many more Negroes than whites in Mississippi live at or close to the subsistence level.

The stock southern answer fatuously says that the Negroes' economic situation and their consequent inability to pay the poll tax are their own fault, that they should be more responsible and energetic in order to increase their earnings. But economic opportunity is inextricably intertwined with the ability to vote and with access to educational opportunities. Other parts of this brief demonstrate that Negroes in Mississippi are denied equal access to educational opportunities, and the poll tax coupled with other measures severely restricts Negroes' right to vote. The discriminatory practices which prevent the Mississippi Negro from earning a living wage can be erased only when the Negro can vote and thereby help to determine who will make the crucial economic decisions.

The discriminatory intent behind the Mississippi poll tax and its uneven application are further demonstrated by the *United States Census of Agriculture: 1959*, Vol. 1, part 33, pp. 6, 102, 106, 112 and 116, abundant evidence of discrimination in collecting (or, rather, in refusing to collect) the tax.

The evidence compels the conclusion that the poll tax provisions of Sections 241 and 243 of the Mississippi Constitution were intended to be discriminatory, are intended to be discriminatory, and are discriminatory in effect today. Therefore, these sections violate the Fifteenth Amendment and the Fourteenth Amendment's guarantee of equal protection of the laws.

D. Prior Supreme Court Decisions Support the Conclusion That Sections 241 and 243 of the Mississippi Constitution Violate the Fourteenth and Fifteenth Amendments.

Breedlove v. Suttles, 302 U. S. 277 (1937), is the leading Supreme Court decision dealing with poll taxes. Payment of the tax discussed in that case was a prerequisite for voting (except for the blind or those over sixty years of age).

but the tax was compulsory for all other males whether or not they voted. The Court in *Breedlove* dealt primarily with the contentions that the tax violated the Nineteenth Amendment and the equal protection clause of the Fourteenth Amendment.

The Court held that the tax was not a deprivation of women's rights. It found that the Georgia tax was primarily a revenue measure which was universally enforced within permissible classifications:

"Payment as a prerequisite is not required for the purpose of denying or abridging the privilege of voting. It does not limit the tax to electors. Aliens are not there permitted to vote, but the tax is laid upon them if within the defined class." 302 U. S. at 282.

Therefore, the Georgia tax was not a privilege tax on voting, but was a capitation tax on certain classes of people. For this reason, the holding in *Breedlove* is not dispositive of the present case. Here we do not have a compulsory capitation tax imposed on a reasonably selected class of people, but rather a tax which has to be paid only in order to vote, and which is discriminatory in both intent and application. As previously noted, the Mississippi poll tax provision appears in the franchise, not the revenue, article of the Mississippi Constitution.

There is dictum in *Breedlove* which might appear to have a bearing on the present case:

"The payment of poll taxes as prerequisite to voting is a familiar and reasonable regulation long enforced in many states and for more than a century in Georgia. That measure reasonably may be deemed essential to that form of levy. Power to levy and power to collect are equally necessary. And, by the exaction of payment before registration, the right to vote is neither

denied nor abridged on account of sex." 302 U. S. at 283-84.

But this language is not decisive here. The Mississippi tax is a privilege tax on voting, not a revenue tax. The Mississippi tax is discriminatory in its intent and application, as the Georgia tax was held not to be. The Court's statement, quoted above, is the only discussion in its opinion of an issue not before the Court, since the appellant was a white male. The Georgia poll tax was imposed on males and females, but females were exempted if they did not register to vote. This exemption was justified for various gentlemanly reasons, according to the Court. 302 U. S. at 282-83. The Georgia tax, being imposed on all males, whether they voted or not, was not a privilege tax on the male appellant's voting. It may well have been a privilege tax on females' voting, but no female was challenging the tax.

The Supreme Court has long maintained an aggressive and diligent policy of enforcing the spirit of the Fifteenth Amendment:

- "The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." *Lane v. Wilson*, 307 U. S. 268, 275 (1939).

This policy invalidates Mississippi's poll tax, even if overt discrimination by voting registrars in administering the tax is not sufficient to invalidate the tax itself.

The Supreme Court demonstrated its determination to safeguard voting rights in *Gomillion v. Lightfoot*, 364 U. S.

339 (1960). Alabama had redrawn the municipal boundaries of Tuskegee so that almost all Negroes were excluded from the city and the Court held this gerrymander violative of the Fifteenth Amendment.

The power of the states to establish qualifications for voters under Article 1, Sec. 4 of the United States Constitution is similar to that of the states to establish political boundaries within states. In exercising either power the state may not deprive any race of the right to vote protected by the Fifteenth Amendment. The Mississippi poll tax in intent and in application deprives Negroes of the right to vote. Therefore the Mississippi poll tax violates the Fifteenth Amendment. Obviously it also violates the equal protection of the laws clause of the Fourteenth Amendment, since this discrimination on account of race clearly does not give Negroes the same rights under Mississippi law as are enjoyed by whites.

IV.

The cumulative discriminatory impact of the laws challenged herein renders them unconstitutional, even if individually they are valid.

The literacy, constitutional interpretation, and good moral character tests and the poll tax, were intended to, and do have an overwhelming combined impact that discriminates against Negroes. Each test presents another hurdle for the prospective voter, and offers another opportunity for discretion that invites discrimination. Even if the results of these requirements are not evident when each statute is considered alone, the pattern definitely emerges when the whole scheme is viewed against the background of Mississippi practice in the past and at present. The segregationists' plan is simple: create barriers, delay and harass, and thus maintain white supremacy. However, the tests for voting allow discrimination in education and employment to affect the political process which offers the Negro his best chance to elect state officials who will help end the pattern of discrimination. An examination of these laws in context can lead to but one conclusion—they were intended to discriminate, have been and will be applied to discriminate, and are accordingly inconsistent with the Constitution of the United States.

CONCLUSION

The Court below should be reversed and the Mississippi constitutional and statutory provisions involved here should be held unconstitutional.

Respectfully submitted,

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